A

MAMASOBRI USENG

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
AHMAD MAAROP JCA
MOHAMED APANDI ALI JCA
[CRIMINAL APPEAL NO: K-05-56-2006]

C

7 JUNE 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 23,829g of cannabis - Whether legal presumption of trafficking under s. 37(da) could be invoked - Drugs found in car driven*

D

by accused - Accused looking worried and panicky when car stopped by customs officer - Accused having remote control to open compartment containing drugs - Actual possession and knowledge of drugs established - Accused failed to rebut presumption of trafficking - Prosecution's case proven beyond reasonable doubt - Dangerous Drugs Act 1952, s. 37(da)

E

CRIMINAL PROCEDURE: *Appeal - Appellate court, power and duty of - Misdirection by trial court - Whether miscarriage of justice occasioned - Whether sufficient independent evidence to warrant the decision in existence - Courts of Judicature Act 1964, s. 60(1)*

F

EVIDENCE: *Circumstantial evidence - Conduct - Accused's stunned, scared and nervous appearance, evidence of - Proper inference to be drawn from such conduct - Whether evidence of such conduct admissible under s. 8 Evidence Act 1950 - Whether such conduct evidence of a guilty mind - Failure of accused to offer any explanation - Evidence Act 1950, ss. 8,*

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EVIDENCE: *Presumption - Drug trafficking - Whether reliance upon presumption under s. 37(da) Dangerous Drugs Act 1952 correct - Actual possession and knowledge of drugs established - Dangerous Drugs Act*

H

1952, s. 37 (da)

The appellant was stopped by a customs officer (PW1) near the Immigration Complex, Bukit Kayu Hitam. The appellant was driving a pick-up truck and was coming from the direction of

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Thailand. He was the sole occupant of the vehicle. When the car was stopped, the appellant looked worried and was in the state of panic. Upon inspection, a transparent plastic package was found

under the driver's seat containing dried leaves, suspected to be cannabis. PW1 also found a key with remote control from the right pocket of the trousers of the appellant and when queried about it, the appellant replied that it was a key to another car. However, each time the remote was pressed there would be a sound of "ketat!" coming from the back passenger's seat. Upon further inspection, PW1 found a special compartment underneath the back passenger's seat containing 23 plastic packages of dried leaves, suspected to be cannabis. The total weight of cannabis found was 23,829 grammes. The appellant was charged, convicted and sentenced to death on a charge of trafficking 23,829 grammes of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Akta 234). The appellant appealed against conviction and sentence. The appellant claimed that the learned judge had used double presumptions and that the judge had not made any finding of actual possession. It was also claimed that the judge had imposed the wrong burden of proof upon the appellant, namely that of balance of reasonableness. The prosecution argued that the finding of facts were not disputed and that there were sufficient evidence to convict the appellant.

Held (dismissing the appeal)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) It was crystal clear that the appellant was in possession of the drugs. The possession of the drugs had all the three damning characteristics, of incriminating the appellant, namely (a) knowledge of nature of thing possessed; (b) power of disposal of thing possessed and (c) conscious of the possession of the thing. The learned trial judge did in fact make an actual finding on the issue of possession. (para 16)

(2) Section 37(d) of the DDA was not applicable in this case as the vehicle in which the drugs was carried did not *ipso facto* fall within the meaning of the words "anything whatsoever containing any dangerous drug." (para 19)

(3) The findings of the learned judge was particularly sufficient to infer guilty knowledge on the part of the appellant. The evidence of the accused looking stunned, scared and nervous, were evidence of conduct after the discovery of the remote control from the appellant's pocket that linked to the specially constructed compartment where the drugs were found to be

A concealed, were facts that are relevant within the meaning of s. 8 of the Evidence Act and were therefore admissible. Consequential to that, the appellant was then mandated to explain such reactions, as required under s. 9 of the Evidence Act. The appellant did not offer any explanation at all for his B reactions when the vehicle was stopped and searched, and this was done after the discovery of the remote linking to the specially constructed compartment, containing the drugs. In the light of that, the inference of knowledge was properly drawn against the appellant. Thus, there was no necessity for the C prosecution to rely on the presumption of knowledge, under s. 37(h) of the DDA. (para 22)

(4) With the fact that the appellant was in control of the vehicle hours before being stopped, and was in possession of the remote D linking to the specially constructed compartment of the petrol tank of the vehicle, it was clear that the appellant was in possession of the packages containing the drugs. Such findings, with the amount of cannabis being well in excess of 200 grammes, triggered the statutory presumption of trafficking E under s. 37(da) of the Act. (para 23)

(5) On the totality of the evidence the learned trial judge made a correct decision in convicting the appellant. The decision was based on cogent and admissible evidence and not on ethereal F matters. The misdirection (if any) had not occasioned any miscarriage of justice. In such circumstances, the application of the proviso to s. 60(1) of the Courts of Judicature Act 1994 was proper and appropriate. (paras 25 & 26)

Bahasa Malaysia *Translation Of Headnotes*

G

Perayu telah ditahan oleh seorang pegawai kastam (SP1) dekat Kompleks Imigresen, Bukit Kayu Hitam. Perayu ketika itu sedang memandu sebuah trak pick-up dari arah Thailand dan hanya beliau sahaja berada dalam kenderaan tersebut. Apabila kereta tersebut H ditahan, perayu kelihatan takut dan berada dalam keadaan panik. Setelah diperiksa, satu pakej plastik lutsinar yang mengandungi daun-daun kering yang disyakki kanabis didapati berada di bawah tempat duduk pemandu. SP1 juga menjumpai satu kunci kawalan jauh dari dalam poket kanan seluar perayu dan apabila ditanya I mengenainya perayu menjawab bahawa ia adalah kunci kepada sebuah kereta lain. Bagaimanapun, setiap kali butang kawalan jauh ditekan, bunyi "ketat" kedengaran dari arah tempat duduk

penumpang belakang. Setelah diperiksa lanjut, SP1 mendapati satu kompartmen khas di bawah tempat duduk penumpang belakang di mana terdapat 23 pakej plastik daun-daun kering, juga disyakki kanabis. Jumlah besar kanabis yang dijumpai ialah 23,829 gram. Perayu telah dituduh, dan kemudian disabit dan dihukum mati di atas pertuduhan mengedar 23,829 gram kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Perayu merayu terhadap sabitan dan hukuman yang dijatuhkan. Perayu mendakwa bahawa yang arif hakim telah menggunapakai anggapan berganda dan bahawa hakim gagal membuat sebarang dapatan milikan. Didakwakan seterusnya bahawa hakim telah mengenakan beban membukti yang salah terhadap perayu, iaitu atas imbangan kebarangkalian. Pendakwaan berhujah bahawa dapatan fakta telah tidak dipertikai dan bahawa terdapat keterangan mencukupi untuk mensabitkan perayu.

Diputuskan (menolak rayuan)
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Adalah amat jelas bahawa perayu mempunyai milikan dadah. Milikan dadah menyerlahkan ketiga-tiga ciri terkutuk untuk mensabitkan kebersalahan perayu, iaitu: (a) pengetahuan mengenai sifat benda yang dimiliki; (b) kuasa untuk melupus benda yang dimiliki; dan (c) menyedari mengenai milikan benda tersebut. Yang arif hakim telah pun membuat dapatan sebenar mengenai isu milikan.

(2) Seksyen 37(d) ADB tidak terpakai dalam ke sini oleh kerana kenderaan di mana dadah dibawa tidak *ipso facto* terangkum ke dalam maksud perkataan-perkataan "anything whatsoever containing any dangerous drug."

(3) Dapatan-dapatan yang arif hakim secara khususnya mencukupi untuk mengandaikan pengetahuan bersalah terhadap perayu. Keterangan bahawa tertuduh kelihatan terpinga-pinga, takut dan menggigil adalah keterangan mengenai kelakuan selepas penemuan kunci kawalan jauh dari poketnya yang berhubung kepada kompartmen dibina khas di mana dadah dijumpai disorok, adalah fakta relevan di bawah maksud s. 8 Akta Keterangan dan dengan itu boleh diterima-masuk. Ekoran dari itu, perayu berkewajipan untuk menjelaskan reaksi-reaksinya tersebut, seperti yang dikehendaki oleh s. 9 Akta Keterangan. Perayu tidak menawarkan sebarang penjelasan bagi reaksi-reaksi

A berkenaan semasa kenderaannya ditahan dan diperiksa, yang mana dilakukan selepas penemuan kunci kawalan jauh yang berhubungan dengan kompartmen dibina khas yang mengandungi dadah. Mengambilkira semua ini, inferens pengetahuan telah dibuat dengan teraturnya terhadap perayu. B Oleh itu, tiada keperluan untuk pendakwaan bergantung kepada anggapan pengetahuan di bawah s. 37(h) ADB.

(4) Dengan fakta bahawa perayu mempunyai kawalan kenderaan beberapa jam sebelum ditahan, dan memiliki kunci kawalan jauh C yang berhubung dengan kompartmen dibina khas pada tangki minyak kenderaan, maka jelas bahawa perayu mempunyai milikan pakej-pakej yang mengandungi dadah. Dapatan sedemikian, ditambah dengan berat dadah kanabis didapati melebihi 200 gram, telah membangkitkan anggapan pengedaran D di bawah s. 37(da) ADB.

(5) Berdasarkan keseluruhan keterangan, yang arif hakim bicara telah membuat dapatan yang betul apabila mensabitkan perayu. Keputusan itu diasaskan kepada keterangan-keterangan E meyakinkan dan boleh diterima-masuk dan bukan perkara-perkara khayal. Salah arahan (jikapun ada) tidak menyebabkan sebarang salahlaksana keadilan. Dalam keadaan sedemikian, penggunaan proviso kepada s. 60(1) Akta Mahkamah Kehakiman 1964 adalah betul dan teratur.

F **Case(s) referred to:**
Lim Sing Hiaw v. PP [1964] 1 LNS 92 FC ***(refd)***
Lim Tong v. PP [1937] 1 LNS 34 HC ***(refd)***
Osman Abdullah v. The PP, Johore [1957] 1 LNS 51 HC ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***
G *Syed Ali Syed Abdul Hamid v. PP [1982] CLJ 188; [1982] CLJ (Rep) 340 FC* ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
Lim Tong v. PP [1937] 1 LNS 341 ***(refd)***

H **Legislation referred to:**
Courts of Judicature 1964, s. 60(1)
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), (h), 39B(1)(a)
Evidence Act 1950, ss. 8, 9

I *For the appellant - Bernard Francis; M/s Bernard Francis*
For the respondent - Jamil Arifin DPP

[Appeal from High Court, Alor Star; Criminal Trial No: 45-06-2003]

[Editor's note: For the High Court judgment, please see PP lwn. Mamasobri Useng [2006] 1 LNS 363.]

Reported by Amutha Suppayah

JUDGMENT

Mohamed Apandi Ali JCA:

[1] The appellant was convicted and sentenced to death on a charge of trafficking 23,829 grammes of cannabis. The charge reads as follows:

> Bahawa kamu pada 8 November 2001 jam lebih kurang 12.20 tengahari di Kompleks Imigresen Bukit Kayu Hitam, dalam daerah Kubang Pasu, dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya jenis Cannabis seberat 23,829 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] On appeal, we dismissed the appeal and confirmed the conviction and sentence. We now give our reasons.

Facts Of The Case

[3] On 8 November 2001 at about 12.20pm, PW1, a Custom Officer, stopped an Isuzu pick-up bearing registration number XF 1369 PTN near the Immigration Complex, Bukit Kayu Hitam. The said pick-up came from the direction of Thailand and it was stopped for a routine random search. The sole occupant of the vehicle was the driver who was identified by PW1 as Mr. Mamasobri Useng, the appellant in the present appeal.

[4] When the car was stopped by PW1, the appellant looked worried and was in the state of panic (kelam kabut). After identifying himself as a customs officer, PW1 instructed the appellant to move his pick-up forward and reverse it to the green lane for inspection of the vehicle. The appellant was unable to reverse his pick-up properly until after 3 to 4 attempts.

[5] Upon inspection of the pick-up which was carried out by PW1 together with two other customs officers, Siti Zainura and Mazli in the presence of the appellant, one transparent plastic package was found under the driver's seat. This plastic package containing dried leaves, suspected to be cannabis, was later marked and tendered as exh. "P10".

[6] PW1 showed the plastic package to the appellant and placed it back at the same place, which was under the driver's seat. Later PW1 also found a key with remote control from the right pocket of the trousers of the appellant and when queried about it, the appellant replied that it was a key to another car. However, each time the remote was pressed there would be a sound of "ketat!" coming from the back passenger's seat. The appellant was then detained and the pick-up was brought to the Stor Pencegah for a more detailed inspection. The further inspection was conducted in the presence of the appellant.

[7] During the further inspection of the pick-up, PW1 found a special compartment underneath the back passenger's seat. The compartment was covered by three layers of coverings. The first covering which was made of wood and covered with red rubber cloth, can be opened with the automatic remote. The other two coverings were made of iron sheets. When all the three coverings were opened, PW1 found 23 plastic packages containing dried leaves, suspected to be cannabis. These plastic packages were later tendered and marked as exhs. "P11 to P33".

[8] All the recovered 24 plastic packages (exhs. "P10" and "P11-P33") containing dried leaves were later sent to the chemist (PW2) for analysis and it was confirmed that the dried leaves were cannabis as defined under s. 2 of the DDA. The total weight of cannabis was 23,829 grammes.

[9] PW3, a mechanical engineer of Public Works Department who examined the pick-up, at the request of Customs Department confirmed that the petrol tank under the passenger's seat of the pick-up had been modified. In his evidence PW3 said that the tank was divided into two compartments using an iron plate. The plate in the tank was attached to the tank using a brazing technique. The tank was made of mild steel.

[10] The learned trial judge in the course of the trial, also inspected the said pick-up and the compartment under the back passenger's seat and found it to be specially constructed which could be opened automatically by using the remote, that was recovered from the appellant.

Submissions By Parties

[11] The main thrust of learned counsel's argument is on the usage of double presumptions by the learned trial judge. Learned counsel also submitted that the trial judge did not make any finding of actual possession and had imposed the wrong burden of proof upon the appellant, namely that of balance of reasonableness. Counsel quoted passages of the judge's grounds of judgment to support his argument.

[12] The prosecution, in reply, while conceding that there were passages in the grounds of judgment that indicated the usage of double presumptions, argued that the finding of facts were not disputed and that there were sufficient evidence to convict the appellant.

Findings Of This Court

[13] In order to appreciate the argument of the learned counsel for the appellant, it is pertinent to cite the relevant passages in the grounds of judgment, that gave rise to the submission on double presumptions. The offending passages are at pp. 99 and 100 of appeal record, which respectively reads as follows:

> Saya sendiri telah memeriksa pick-up dan compartment berkenaan dan telah mencatitkan hasil pemeriksaan saya. Dalam keadaan sedemikian, anggapan di bawah sub-seksyen (d) dan sub-seksyen (h) seksyen 37 Akta terpakai terhadap tertuduh.

and

> Saya berpuas hati bahawa selepas kes pendakwaan ditutup pihak pendakwaan telah membuktikan kes terhadap tertuduh di bawah seksyen 39B(1)(a) dengan mengguna anggapan di bawah subseksyen-subseksyen (d), (da)(iv) dan (h) seksyen 37 Akta. Tertuduh oleh yang demikian dipanggil membela diri ke atas pertuduhan yang dihadapi.

[14] On the issue of wrong burden of proof, the offending part of the grounds, can be seen at p. 107 of the appeal records, which reads as follows:

> Berasaskan prinsip sepertimana tersebut di atas, selepas pembelaan tertuduh diperiksa dengan teliti saya dapati ianya tidak meyakinkan. Ini disebabkan bahawa kes bagi pihak pendakwaan telah dibuktikan dengan jelas. Keadaan-keadaan yang menunjukkan pengetahuan serta kawalan dan milikan tertuduh mengenai dadah berbahaya yang ada dalam pick-up tersebut oleh yang demikian perlu diberi penjelasan oleh tertuduh atas imbangan yang menasabah.

[15] After going through the whole evidence adduced at the trial, as can be found in the appeal record, despite the seeming imbroglio over the applications of the presumptions and purported wrong burden of proof, we find that there are overwhelming evidence to support the conviction.

[16] From the facts of the case, as illustrated above, it is crystal clear that the appellant was in possession of the drugs. From the evidence adduced, the possession of the drugs do have all the three damning characteristics, of incriminating the appellant, as enunciated in the classic case of *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72, namely (a) knowledge of nature of thing possessed; (b) power of disposal of thing possessed and (c) conscious of the possession of the thing.

[17] It is noted that the learned trial judge did in fact make an actual finding on the issue of possession. The learned judge at p. 99 wrote: "... saya dapati pemilikan dadah berbahaya oleh tertuduh bukan merupakan pemilikan yang pasif tetapi satu pemilikan untuk mengedar sepertimana ditakrif di dalam s. 2 dan s. 39B(1)(a) Akta. Ini adalah kerana tertuduh sebenarnya membawa dengan pick-up berkenaan dadah berbahaya berkenaan daripada Thailand masuk ke Malaysia. Amaun dadah berbahaya tersebut amatlah besar dan mustahil untuk kegunaan tertuduh sendiri. Akhir sekali dadah berkenaan disorok dengan susah payah di tempat dalam pick-up yang mana memang tidak akan disyakki oleh sesiapa yang melihat pick-up tersebut. Tertuduh mempunyai kawalan dan jagaan yang terus terhadap dadah berkenaan melalui remote yang dia simpan dalam poket kanannya."

[18] On the alleged wrong burden, upon closer reading of the grounds of judgment, we conclude that basically there was no error committed by the learned trial judge. This can be seen at the conclusion of the judgment, where the learned judge wrote: "Oleh yang demikian saya berpuashati bahawa pihak pendakwaan telah berjaya membuktikan kesnya terhadap tertuduh tanpa apa-apa keraguan yang menasabah."

[19] In our view, the learned counsel may have been misconceived on the issue of burden of proof after reading the preceding sentence before the conclusion by the learned judge, where it was written as follows: "Tertuduh juga gagal atas imbangan keberangkalian membangkitkan apa-apa keraguan yang menasabah terhadap kes pihak pendakwaan." On this matter, it is pertinent to state the law in such circumstances. It is trite law that any rebuttable statutory presumption can be rebutted on a balance of probabilities. The misconception is compounded by the references to the presumptions under s. 37(d) and s. 37(h) of the Dangerous Drugs Act ("DDA"). Section 37(d) of the DDA is not applicable in this case. It has been held in by the Federal Court in the case of *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] CLJ 188; [1982] CLJ (Rep) 340 and more clearly in the case of *PP v. Lin Lian Chen* [1992] 4 2086; [1992] 1 CLJ (Rep) 285 that the statutory presumption under s. 37(d) of the Act did not arise as the vehicle in which the drugs was carried did not *ipso facto* fall within the meaning of the words "anything whatsoever containing any dangerous drug." Likewise the presumption under s. 37(h), based on the facts and findings, is also not applicable. Section 37(h) is only a presumption as to knowledge of concealment, and from the evidence adduced there are other facts that showed such knowledge by the appellant.

[20] With that note, we now come to our finding of overwhelming evidence that we mentioned earlier. It is worth noting that the learned trial judge in his grounds of judgment (at p. 95 of the appeal records), has listed the following findings:

> Daripada keterangan pihak pendakwaan terdapat beberapa perkara yang jelas telah dibuktikan:
>
> 1. Tertuduh merupakan pemandu pick-up berkenaan semasa ditahan oleh SP1 tanpa lain-lain penumpang dalamnya;
>
> 2. Apabila ditahan dan beritahu oleh SP1 bahawa SP1 adalah pegawai Jabatan Kastam, tertuduh menjadi gelisah dan kelam-kabut;

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3. Apabila diminta menggerakkan ke hadapan dan mengundurkan pick-up ke tempat pemeriksaan pertama tertuduh tiba-tiba tidak dapat memandu pick-up berkenaan dengan baik dan perlu cuba tiga atau empat kali;

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4. Di tempat pemeriksaan pertama SP1 telah dapati satu bungkusan mengandungi dadah berbahaya di bawah kerusi pemandu;

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5. SP1 kemudian dapati satu kunci bersama remote daripada poket kanan seluar tertuduh dan apabila ditanya oleh SP1, "ini kunci apa?", tertuduh menjawap "kunci kereta lain";

6. Apabila SP1 tekan remote berkenaan SP1 mendengar bunyi "ketat" di bahagian tempat duduk penumpang belakang pick-up berkenaan tiap-tiap kali remote ditekan;

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7. Pemeriksaan khusus di tempat duduk berkenaan telah menunjukkan bahawa ada compartment khas dibina dalam tangki minyak petrol pick-up yang tersorok daripada pandangan dengan lapisan pertama kayu disalut dengan kain getah warna merah, lapisan-lapisan kedua dan ketiga yang terdapat kesan-kesan tangki tersebut dipotong;

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8. Tempat 23 bungkusan dadah dijumpai jelas diperbuat dengan khas untuk menyorok dadah berkenaan; dan

9. Kesemua bahan-bahan tumbuhan dalam 24 bungkusan yang dijumpai disahkan sebagai genus cannabis.

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[21] These findings do have a cumulative effect on the case against the appellant. Such findings carry with it a snow-ball effect that amplified and constitute sufficient evidence to convict the appellant, without having to resort to any of the above mentioned presumptions.

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[22] From the list of findings, it is particularly sufficient to infer guilty knowledge on the part of the appellant. The evidence of the accused looking stunned, scared and nervous, are evidence of conduct after the discovery of the remote control from the

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appellant's pocket that linked to the specially constructed compartment where the drugs were found to be concealed, are facts that are relevant within the meaning of s. 8 of the Evidence Act and are therefore admissible. Consequential to that, the appellant is then mandated to explain such reactions, as required under s. 9 of

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the Evidence Act. From the evidence given by the appellant in his

defence, he did not offer any explanation at all for his reactions when the vehicle was stopped and searched, and this was done after the discovery of the remote linking to the specially constructed compartment, containing the drugs. In the light of that, the inference of knowledge was properly drawn against the appellant. In such circumstances, there is no real necessity for the prosecution to rely on the presumption of knowledge, under s. 37(h) of the DDA. As stated earlier, inference as to the knowledge of the drugs is also independent of the statutory presumption under s. 37(d) of the Act. On this point, it is suffice to refer to the Federal Court decision in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337.

[23] With the fact that the appellant was in control of the vehicle hours before being stopped, and was in possession of the remote linking to the specially constructed compartment of the petrol tank of the vehicle, it is clear that the appellant was in possession of the packages containing the drugs. Such findings, with the amount of cannabis being well in excess of 200 grammes, will trigger the statutory presumption of trafficking under s. 37(da) of the Act.

Is There A Misdirection By The Trial Judge?

[24] Despite the seeming imbroglio over the usage of the presumptions under s. 37(d) and (h) of the DDA and the seeming misconception of the ensuing burden of proof, we are of the opinion that there is no error of misdirection by the learned trial judge. The final part of the judgment which touched on the basic burden of proof in criminal cases is sufficient to erase any suspicion or indication of any misdirection by the learned trial judge.

[25] In this case, even if we are wrong in holding that there is no misdirection, from the review and evaluation of all evidence presented at the trial, we further conclude that no failure of justice has been occasioned for the appeal to be dismissed. A *fortiori*, the proviso to s. 60(1) of the Court of Judicature Act 1994 which reads as follows:

> 60(1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such

A other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in
B favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

is sufficient law for us to act on. On the facts as disclosed, we are satisfied that notwithstanding the imbroglio of the usage of the
C statutory presumptions and having regard to the overwhelming nature of the case for the prosecution, the learned trial judge would have and indeed come to the same decision. In short, on the totality of the evidence the learned trial judge have made a correct decision in convicting the appellant. The decision was based on
D cogent and admissible evidence and not on ethereal matters. The misdirection, if any (of which we are of the opinion that there was none) had not occasioned any miscarriage of justice.

[26] In such circumstances, the application of the proviso to
E s. 60(1) of the Courts of Judicature Act 1964 is proper and appropriate. The Federal Court case of *PP v. Abdul Manaf bin Muhamad Hassan* [2006] 2 CLJ 129 and the Supreme Court case of *Khoo Hi Chiang (supra)* are useful guidance on this matter. Such a position has also been pronounced in case law, since pre-merdeka
F days, such as in the cases of:

Lim Tong v. The PP, Johore [1937] 1 LNS 34;

Osman bin Abdullah v. PP [1957] 1 LNS 51; and

G *Lim Sing Hiaw v. PP* [1964] 1 LNS 92.

Conclusion

[27] After hearing the submissions and upon perusal of the evidence as a whole, we find that the evidence adduced at the trial
H clearly indicate an inescapable inference that the appellant had '*mens rea* possession' of the packages containing the drugs. The evidence also showed that the appellant was in possession of the packages with knowledge of their contents. There is not a single evidence to suggest otherwise. The drugs has been confirmed to be cannabis
I within the context of the DDA. The defence has been nothing, but

bare denials. Such denials, in the face of the strong and over whelming evidence did not raise any reasonable doubt on the prosecution's case. The learned judge had carefully considered the evidence of the prosecution and the defence. We are unable to find any error in his findings. There was no evidence in rebuttal to rebut the presumption of trafficking, under s. 37(da) of the Act.

[28] In such circumstances, and for reasons as stated above, we conclude that there is no merit in the appellant's appeal against conviction and sentence. By a unanimous decision, we dismissed the appeal. Accordingly, we affirmed the conviction and sentence, as decided by the High Court.